(4)

No. 94-1249

FILED
FEB 24 1995

In The

Supreme Court of the United States

October Term, 1994

DRUG EMPORIUM, INC.,

Petitioner,

vs.

PARFUMS GIVENCHY, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Is the "first sale doctrine" in § 109(a) of the Copyright Act a defense to an action for infringement under § 602(a) of the Act, when genuine goods with a copyrighted package design were imported into this country after the copyright owner sold them abroad?

2. Do retailers who sell goods imported into this country by others violate the prohibition against unauthorized "importation" in § 602(a) of the Copyright Act?

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M. Nimmer & D. Nimmer, *Nimmer on Copyright* (1994) 3

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PETITIONER'S REPLY BRIEF

Petitioner Drug Emporium, Inc. ("Drug Emporium") submits this reply to the Brief in Opposition ("Opp.") filed by respondent Parfums Givenchy, Inc. ("Givenchy USA").

JURISDICTION

Givenchy USA is wrong when it suggests that the petition was untimely filed. Although the Clerk received the petition on January 20, 1995, the petition was mailed via first class express mail on January 19, 1995, the 90th day after the entry of judgment by the court of appeals below. The Clerk properly relied on the order of the court of appeals below denying Drug Emporium's "petition for rehearing," and docketed the petition for certiorari on the date of receipt rather than the date of mailing. *See* Stern, Gressman & Shapiro, *Supreme Court Practice*, § 6.9, p. 326 (6th ed. 1986). The Clerk has changed the docket date from January 20 to January 19, to reflect the date of mailing. Sup. Ct. R. 29.2; *see* A-1, *infra*.

Missouri v. Jenkins, 495 U.S. 33 (1990), also demonstrates that Drug Emporium timely filed the petition. The court of appeals unquestionably treated the suggestion for rehearing en banc as a petition for rehearing. Like *Jenkins*, this is not a case in which the court of appeals below "granted rehearing or amended its order solely for the purpose of extending" the time for filing a petition for certiorari. *Id.* at 49.[1]

REASONS FOR GRANTING THE WRIT

I. A True Conflict Exists Between the Third and Ninth Circuits.

A. The court of appeals below held that "the importation right [conferred by § 602(a)] survives as to a particular copy unless and until there has been a first sale *in the United States*." Pet. App. 8 (emphasis in text). The Third Circuit in *Sebastian International, Inc. v. Consumer Contacts (PTY) Ltd.*, 847 F.2d 1093 (3d Cir. 1988), held that "the place of sale is not the critical factor in determining whether section 602(a) governs." Pet. App. 49. Despite these contrary rulings, Givenchy USA insists there is no conflict between the two circuits because of a single factual difference: in this case the copyrighted goods were made abroad and sold abroad by the copyright owner, while in *Sebastian* the goods were made in the United States and sold abroad by the copyright owner.

Givenchy USA claims that "[t]he place of manufacture is significant because Section 109(a) refers to copies 'lawfully made,' which has been construed as a reference to copies lawfully made *within the United States*." Opp. 8

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[1] As in *Jenkins*, the Ninth Circuit did not issue its mandate within 21 days of entry of the judgment, Fed. R. App. P. 35(c) and 41(a), but only after denying a petition for rehearing. *See infra* at A-2-3 (mandate issued Jan. 20, 1995); *see Jenkins*, 495 U.S. at 48.

(emphasis in text). However, the court of appeals below rejected the construction of "lawfully made" suggested by Givenchy USA:

> In *BMG Music*, we stated: "The words 'lawfully made under this title' in § 109(a) grants first sale protection only to copies legally made and sold in the United States." 952 F.2d at 319 [Pet. App. 32]. Amici and some courts have pointed out that this broad language, if taken literally, would render the first sale doctrine wholly inapplicable to foreign manufactured goods, even after the goods have been lawfully imported into the United States with the authorization of the U.S. copyright holder. . . . We agree that such a result would be untenable, and that *nothing in the legislative history or text of § 602(a) supports such an interpretation.*

Pet. App. 10 n.8 (emphasis supplied).

The *Sebastian* court also expressed "some uneasiness with this construction of 'lawfully made' because it does not fit comfortably within the scheme of the Copyright Act. When Congress considered the place of manufacture important . . . the statutory language clearly expresses that concern." Pet. App. 48 n.2. Givenchy USA's suggested construction of "lawfully made" was originated by *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.*, 569 F. Supp. 47 (E.D. Pa. 1983), *aff'd without op.*, 738 F.2d 424 (3d Cir. 1984). The *Sebastian* court was careful to note that *Scorpio's* construction is "not binding" on the Third Circuit. Pet. App. 48.[2]

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[2] Givenchy USA cites M. Nimmer & D. Nimmer, *Nimmer on Copyright*, for the proposition that the *Scorpio* construction is "closest to the legislative intent." However, the authors also acknowledge that there is an "antipathy" between *Sebastian* and the approach taken in *Scorpio*. *Id.* at § 8.12[B][6] at 8-153, n.69.

B. As an alternative analysis, Givenchy USA states that § 109(a) does not apply to sales abroad of copyrighted goods because the Copyright Act was not intended to have extraterritorial effect. Opp. 15-16. However, "[t]his statement is neither completely accurate nor fully developed." *Sebastian International, Inc. v. Consumer Contact (PTY) Ltd.*, 664 F. Supp. 909, 917 (D.N.J. 1987), *vacated on other grounds*, 847 F.2d 1093 (3d Cir. 1988):

> A more accurate expression of the underlying legal principle is found in *Beechwood Music Corp. v. Vee Jay Records*, 328 F.2d 728, 729 (2d Cir. 1964), in which the Hon. Henry Friendly explained that, absent clearly expressed statutory intent to the contrary, the presumption is that the United States Code does not apply to actions not occurring in, *or having an effect in*, the United States. . . . A foreign sale, to the extent it does not satisfy the first sale doctrine, has an extremely significant effect in the United States because it defines the United States copyright owner's exclusive rights.

Id. (emphasis in text); *accord, Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc.*, 832 F.2d 1378, 1386 (C.D. Cal. 1993) ("the judicial presumption against the application of United States statutory law does not apply in cases such as *BMG Music, Scorpio*, or the present case") (citing *Beechwood, supra*).[3]

C. Givenchy USA next argues that the Court's denial of certiorari in *BMG Music v. Perez*, 952 F.2d 318

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[3] Works are "subject to protection under this title" if the "work is first published . . . in a foreign nation that . . . is a party to the Universal Copyright Convention; or . . . is a Berne Convention work." 17 U.S.C. § 104(b). By seeking protection under the Copyright Act for label designs made in France (a party to both Conventions), Givenchy USA implicitly admits that the designs were "lawfully made under this title."

(9th Cir. 1991), *cert. denied*, 112 S. Ct. 2997 (1992), indicates the absence of a conflict here. Opp. 9. Unlike this case and unlike the Third Circuit decision in *Sebastian*, *BMG Music* involved a first sale by a licensee. The role of the copyright owner, the core of the conflict here, was not an issue in *BMG Music*.[4] The conflict here involves express holdings, not *dicta*. In the Third Circuit, "the place of sale is not the critical factor in determining whether section 602(a) governs" and "a first sale by the copyright owner extinguishes any right later to control importation," Pet. App. 49. In the Ninth Circuit, "sales *abroad* do not constitute a defense to copyright infringement under § 602(a)" and "the relationship between the copyright holder and the seller abroad is irrelevant." Pet. App. 12 n.9 (emphasis in text).

The conflict is the result of statutory silence. Neither the texts of §§ 109(a) and 602(a), nor their legislative histories, refer to each other. The only common textual thread is that §§ 109(a) and 602(a) both refer to § 106. *See* 17 U.S.C. § 602(a) (importation without authority is "an infringement of the exclusive right to distribute . . . under section 106"); 17 U.S.C. § 109(a) (first sale doctrine applies "notwithstanding the provisions of section 106(3)"). The copyright owner's exclusive right of distribution in § 106(3), and *all other* exclusive rights of a copyright owner, are expressly made "subject to sections 107 through 120," and therefore subject to § 109(a). 17 U.S.C. § 106.

D. Section 109 has specific exceptions that do not mention § 602(a). *See* 17 U.S.C. § 109(b) & (d). Givenchy USA prefers to argue that because § 602(a) also contains specific exceptions, an additional exception based on § 109(a) may not be implied. Opp. 15. Congress used

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[4] The petitioner in *BMG Music* was not represented by counsel, and the questions he presented differ from those here. *See* A-4 & A-5, *infra*.

explicit language when it wanted to exempt one provision of the Copyright Act from the reach of another. *See* 17 U.S.C. § 109(a) ("Notwithstanding the provisions of section 106(3) . . . "). There is no language in § 602(a) exempting it from the first sale doctrine.

E. Both the court of appeals below and the *Sebastian* court noted there were two possible interpretations of the relation between §§ 109(a) and 602(a). Pet. App. 7, 45. Givenchy USA is wrong when it claims that the interpretations adopted by the two courts are consistent with each other. The Third Circuit held that "a first sale by a copyright owner extinguishes any right later to control importation of those copies,", and "the place of sale is not the critical factor in determining whether § 602(a) governs." Pet. App. 49. The Ninth Circuit held that "the importation right survives as to a particular copy unless there has been a 'first sale' *in the United States.*" Pet. App. 8 (emphasis in text). These holdings cannot be simultaneously correct.[5]

In sum, both the Third and Ninth Circuits chose to disregard the place of manufacture as a basis for their decisions. Those decisions present an explicit conflict on whether § 109(a) applies in a § 602(a) action, when there is a first sale abroad by the copyright owner itself.

II. The Second Question Is Properly Reviewable.

Givenchy USA argues that the second question presented by the petition – whether non-importing retailers are liable for unauthorized "importation" infringement

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[5] Givenchy USA claims that the Ninth Circuit left open a third interpretation – that § 109(a) applies to "lawful" first sales following an importation authorized by the copyright owner. Opp. 11. Under this view, however, an "importation" not authorized by the copyright owner is never subject to § 109(a); only acts *after* authorized "importations" (and thus beyond the reach of § 602) would be subject to § 109(a). This would still mean that in the Ninth Circuit, § 602(a) would *not* be subject to § 109(a).

under § 602(a) – was not "squarely raised" by Drug Emporium because the issue was only mentioned "on one page of its reply brief, and only in the context of its standing argument." Pet. App. 17-18. However, the question was *essential* to the decision below on the issue of standing. When an issue is essential to a decision by a court of appeals, that issue is appropriate for review by this Court. *See Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991) (though not expressly presented below, the appellate court decided "the substantive issue presented" in the petition); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960) (question in the petition was "within the scope of the issues" raised below).[6]

Only the "legal or beneficial owner of an exclusive right under a copyright" is "entitled . . . to institute an action for any infringement . . . committed while he or she is the owner of it." 17 U.S.C. § 501(b). When importation occurred in this case, Givenchy USA was not the legal or beneficial owner of any right. It only acquired such rights afterwards. For any infringing act to have occurred while Givenchy USA owned an exclusive right, the court of appeals necessarily decided that § 602(a) was violated when Drug Emporium sold the goods *after* importation.

Although it does not involve a conflict among circuits, the second question presented is an important one of federal law, Sup. Ct. R. 10.1(c), affecting retailers throughout the United States. By holding that language proscribing "importation" also covers acts other than importation, the Ninth Circuit has given a broader scope to § 602(a) than Congress did in the statute's text – and

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[6] Givenchy USA misunderstands footnote 2 of the opinion below. The Ninth Circuit did *not* say that the liability of non-importing retailers is "irrelevant to the standing question"; rather, it said that the distinction between importation and subsequent sale was "irrelevant to the standing question" because, in the court's view, both activities constituted infringement. Pet. App. 5 n.2.

has enlarged copyright owners' statutory monopoly at the expense of competition.[7]

III. The Significance Of The Decision Below.

A. Givenchy USA suggests that this case is not significant because a handful of district court decisions have created "settled principles" governing the relation between §§ 602(a) and 109(a). Opp. 20 and n.10. Leaving aside Givenchy USA's novel theory of binding precedent, the district court cases cited by Givenchy USA do not address the distinction between first sales by copyright owners and those by licensees. By contrast, other cases that addressed this difference recognized a first sale defense under § 109(a) when the first sale is by the copyright owner itself.

See Sebastian; Red Baron-Franklin Park, Inc. v. Taito Corp., 9 U.S.P.Q.2d (BNA) 1901 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 175 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990). Givenchy USA fails to mention that *Red Baron* was reviewed by Congress in the 1990 Copyright Act amendments, and Congress chose not to nullify the decision. *See* Brief of *Amici Curiae* Costco Wholesale Corporation *et al.* at 7-8 n.5.

B. Givenchy USA suggests that if the decision below has a significant impact on commerce, a conflict with another circuit "is likely to arise." Opp. 21. That assumes that future plaintiffs will be uninformed enough to file their lawsuits elsewhere than in the Ninth Circuit. For any defendant that is a national retail chain or that otherwise "may be found" somewhere in the Ninth Circuit, 28 U.S.C. § 1400(a), copyright owners have every incentive to forum shop the Ninth Circuit.

C. Givenchy USA claims it is not aware of "any great increase" in claims for copyright infringement

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[7] *See* Pet. 20-21; *see also* Brief of *Amici Curiae* Costco Wholesale Corporation *et al.* at 8-9.

under § 602(a). It also states that a remark by the district court below – that "countless" new § 602(a) cases had been filed in the Central District of California – "was made in response to the filing of only *two* cases." Opp. 20-21. These statements are misleading. Givenchy USA alone has brought five other lawsuits in the Central District of California under § 602(a), and its counsel also represents a distributor in a sixth case. *See infra* at A-6-7, Nos. 1-6. Givenchy USA also fails to mention other filings in the Central District. *Id.*[8]

D. Finally, Givenchy USA suggests there are practical limitations on the scope of § 602(a). Opp. 21. Although it is true that there must be some copyright on the product or its label, there is no reason to think that foreign manufacturers will prove incapable of preparing copyrightable label or packaging designs. Givenchy USA also suggests that importers should dismember products abroad – removing labels or packages – and then attempt to sell the products in the United States. Opp. 21. Unsurprisingly, Givenchy USA does not claim that it, Givenchy France, or anyone else has successfully sold products with removed labels or packaging in the U.S. market. Anyone who attempted this would risk a Lanham Act violation. *See Cleary v. News Corp.*, 30 F.3d 1244, 1261 (9th Cir. 1994) (removal of label bearing a trademark and selling the product "in an unbranded state" would violate Lanham Act § 43(a)) (citation omitted).

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[8] Givenchy USA mistakenly states that the petition's quotations from newspaper articles about the Ninth Circuit decision are the words of petitioner's counsel. Although counsel is quoted elsewhere in these articles, the passages cited in the petition are the words of others.

CONCLUSION

For these reasons and those stated in the petition, the Court should grant the petition.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
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February 21, 1995

R. Lawrence Bonner, Esq.
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100 Southeast Second Street
Suite 3400
Miami, FL 33131

Re: Drug Emporium, Inc. v. Parfums Givenchy, Inc.
No. 94-1249

Dear Mr. Bonner:

The petition for a writ of certiorari in the above-entitled case was docketed in this Court on January 19, 1995, as No. 94-1249.

Sincerely,

WILLIAM K. SUTER, JR., CLERK

by

Ruth Jones
Assistant Clerk

Enclosures

NOTE: Docket date amended to reflect the mailing date of the petition for a writ of certiorari.

Office of the Clerk
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121 Spear Street, P. O. Box 193939
San Francisco, CA 94105-3939

January 20, 1995

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Central District of California, Los Angeles
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C.A. NO.	TITLE	AGENCY/ D.C. NO.
92-56359	Parfums Givenchy Inc v. Drug Emporium, Inc.	CV-206-MRP
93-55050	Parfums Givenchy Inc v. Drug Emporium, Inc.	CV-4206-MRP

Dear Clerk:

The following document(s) in the above listed cause(s) is (are) being sent to you under cover of this letter. Counsel are being served with a copy of this letter only.

[x] Certified copy of the Decree of the Court
[ ] Judgment of the National Labor Relations Board
[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Cathy A. Catterson
Clerk of Court

By: Craig Westbrooke
Deputy Clerk

Enclosure(s)
ALL COUNSEL, WITHOUT ENCLOSURES

No. 91-1758

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

EDMUNDO PEREZ, In Pro Se,

Petitioner

vs.

BMG MUSIC, CBS, INC. and
A&M RECORDS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Ninth Circuit

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Petitioner In Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the first sale doctrine provides a defense to copyright infringement claims for phonorecords which are manufactured abroad and exported to the United States.

2. Whether the place of manufacture controls whether or not the first sale doctrine applies to section 602(a) of the Copyright Act. There is an apparent split of authority.

3. Whether section 602(a) of the Copyright Act applies to import records which are not available in the United States.

Recent Cases Under § 602(a) of the Copyright Act Filed In the Central District of California (Partial List)*

1. *Parfums Givenchy Inc. v. Perfumania Inc. and Longs Drug Stores Corp.*, C.D. Cal. No. 92-05730 (filed Sept. 23, 1992).

2. *Parfums Givenchy Inc. v. C&C Beauty Sales, Inc.*, C.D. Cal. No. 92-07455 (filed Dec. 18, 1992).

3. *Parfums Givenchy Inc. v. Allou Distributors*, C.D. Cal. No. 92-02857 (filed May 17, 1993).

4. *Parfums Givenchy Inc. v. Quality King Dist.*, C.D. Cal. No. 93-04789 (filed Aug. 10, 1993).

5. *Parfums Givenchy Inc. v. Kmart Corp.*, et al., C.D. Cal. No. 94-07647 (filed Nov. 10, 1994).

6. *Disenos Artisticos, Etc. v. Costco Wholesale Corp.*, C.D. Cal. No. 93-7061 RAP (filed Nov. 22, 1993; Judgment Jan. 13, 1995), *appeal pending*, 9th Cir. Nos. 95-55018 & 95-55106 (plaintiffs' counsel: Covington & Burling).

7. *Swarovski America Ltd. v. Price/Costco Inc. et al.* and *Swarovski America Ltd. v. Costco Wholesale Corp.*, C.D. Cal. Nos. 93-6365 SVW, 93-7403 SVW (filed Oct. 21, 1993, Dec. 7, 1993; Judgment Dec. 21, 1994).

8. *L'Anza Research International, Inc. v. Costco Wholesale Corp.*, C.D. Cal. No. 95-0244 TSH (filed Jan. 12, 1995).

9. *Wild Side West, Inc. v. Ohio Bag Corp., American Drug Stores, Inc. dba Osco Drug and Sav-On Drug Stores, Inc.*, C.D. Cal. No. CV 93 5656 JSL (filed Sept. 17, 1993).

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* COUNSEL HAS NOT DONE A COMPREHENSIVE SEARCH OF THE DISTRICT COURT'S DOCKET, BUT HAS SIMPLY LISTED KNOWN CASES.

10. *Fonovisa, Inc. v. Alameda Swap Meet Building A, Booth No. 8, Geogurea,* C.D. Cal. No. CV 94 0447 TJH (filed Jan. 21, 1994).

11. *Estee Lauder, Inc. v. Wal-Mart Stores, Inc.,* C.D. Cal. No. CD 94-3277 RMT (filed May 19, 1994).